FUTURE OF TRANSGENDER PRISON INMATES' MEDICAL NEEDS IN THE FIFTH CIRCUIT IN LIGHT OF RECENT CIRCUIT DECISIONS

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Abstract

In 2019 and 2020, the Ninth Circuit and the Western District of Wisconsin, respectively, ordered prison officials to provide sexual reassignment surgery for two transgender inmates suffering from gender dysphoria. These two decisions, happening in consecutive years, created a turning point in the history of federal court decisions on transgender inmates' medical care and Eighth Amendment claims for prison officials' deliberate indifference to such care. This Article will focus on decisions from four U.S. courts of appeals in the twenty-first century by comparing one of First Circuit's conservative decisions overruling a progressive district court's decision and conservative decisions of the Fifth Circuit and lower courts within that circuit with progressive decisions made in the Seventh and Ninth Circuits—which may give hope to transgender inmates seeking medical treatment in the future. Reviewing the evolution of decisions on transgender inmates' medical and psychological needs, the Article argues that the Fifth Circuit should rely on the World Professional Association for Transgender Health Standards of Care both in its analyses of future cases and for revising current state policies related to treatment of transgender inmates.

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INTRODUCTION

Transgender prison inmates suffering from gender dysphoria[1] (GD)

1. *See* AM. PSYCHIATRIST ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-5] ("Gender Dysphoria refers to the distress that

often experience strong resistance from prison officials when requesting medical treatments like hormone therapy or sexual reassignment surgery (SRS). Faced with such resistance, inmates have sometimes sought relief from courts by filing lawsuits alleging violations of their Eighth Amendment rights.[2] In court, inmates must prove that prison officials have acted with deliberate indifference to their medical needs. The courts, having no legislative guidance for addressing transgender inmates' medical requests, have looked to different standards to support their varied decisions on the issue of deliberate indifference. Some have accepted *The World Professional Association for Transgender Health Standards of Care* ("WPATH Standards"),[3] while others have refused to give those standards credit in their analysis; instead, they have based their reasoning on antiquated criteria other circuits have used. This Article will focus on decisions from four of the U.S. courts of appeals in the twenty-first century: a conservative decision made by the First Circuit which overruled a progressive decision of a Massachusetts district court; conservative decisions of the Fifth Circuit and lower courts within that circuit; and the more progressive decisions made in the Seventh and Ninth Circuits. In contrast with the conservative decisions, the progressive decisions give hope to transgender inmates who may request medical treatment in the future.

Part I of this Article will shed light on transgender inmates' incarceration experience in the United States and the factors making their medical needs urgent. Since their expressed gender implicates their whole identity, their medical needs are entangled with security and housing needs. Part II will review how the U.S. Supreme Court has addressed the issue of prison inmates' medical needs in Eighth Amendment claims and how it has defined the term "deliberate indifference." In Part III, the Article will summarize some of the WPATH Standards definitions and guidelines along with the definitions and guidelines in the fifth edition of *The Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5").[4] In Part IV, the Article will review consequential cases that arose within

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may accompany the incongruence between one's experienced or expressed gender and one's assigned gender.").

2. *Despite Receiving Treatment and Living as Female Since Age 14, Inmate Denied Treatment in DOC Custody; Eighth Amendment Lawsuit Seeks End to Policy Denying Transgender Inmates Medically-Necessary Care*, ACLU (Aug. 15, 2016), https://www.aclu.org/press-releases/aclu-sues-florida-prison-officials-over-refusal-recognize-provide-medical-treatment; *see* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); *see also* 42 U.S.C. § 1983 (codifying a cause of action for private citizens whose existing constitutional rights are violated by state actors).

3. ELI COLEMAN ET AL., WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE *passim* (7th ed. 2012).

4. DSM-5, *supra* note 1.

the First and Fifth Circuits and demonstrate the difficulties inmates have faced in proving deliberate indifference when prison officials articulated concerns about housing, security, and expense. Part IV will also discuss how transgender inmates became more successful in establishing their claims, and how recent decisions from the Ninth and Seventh Circuits can change the future of transgender Eighth Amendment claims. Moreover, Part IV will analyze the Fifth Circuit cases that have addressed transgender inmates' medical concerns and refused to authorize SRS, in sharp contrast to other circuits' analyses. Finally, the Article will conclude that the Fifth Circuit could protect transgender inmates' rights by ordering a developed prison policy, tailored to the medical needs of inmates with GD.

I. BACKGROUND INFORMATION

A. *The Population of Transgender Inmates in the United States*

On February 26, 2020, NBC reported that 4,890 transgender individuals are incarcerated in the United States, based on data from forty-five states and Washington, D.C.[5] In his 2014 research, George Brown, a gender-identity expert, asserted that U.S. transgender inmates' medical needs are substantial.[6] Also, as to the population of transgender inmates in each state, Brown and Everette McDuffie determined that the most populous states—California, New York, Florida, and Texas—had the greatest numbers of transgender inmates.[7] Among the incarcerated transgender population, experts have observed instances of suicidal ideation, suicide, and self-castration attempts when transgender inmates did not receive sufficient treatment for GD.[8]

B. *Transgender Inmates' Suicide and Self-Castration Attempts*

A 2011 survey revealed that 41% of respondents who identified as transgender had attempted suicide, compared to only 1.6% of Americans overall.[9] In his 2014 analysis of 129 letters from transgender inmates,

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5. Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436.

6. George R. Brown, *Qualitative Analysis of Transgender Inmates' Correspondence: Implications for Departments of Correction*, 20 J. CORR. HEALTH CARE 334, 335 (2014).

7. George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORR. HEALTH CARE 280, 281 (2009).

8. Brown, *supra* note 6, at 335; *see* Elias Vitulli, *Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons*, 37 SOC. JUST. 53, 60–61 (2010–2011) (discussing instances of self-harm by transgender inmates).

9. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER

Brown reported that 8% had mentioned suicidality, including prior attempts and current ideation.[10] More recent research also found that "increased access to transgender-related health care may reduce the likelihood of attempting suicide among incarcerated transgender inmates."[11]

Self-castration attempts are another urgent issue.[12] When gender-identity disorder remains undiagnosed or untreated in prison settings, inmates with such a disorder often feel the urge to remove their male genitalia.[13]

C. *Transgender Inmates as Targets of Sexual Assault*

Many reports exist of transgender inmates victimized by sexual assault in prison settings.[14] Research has shown transgender inmates are at greater risk of sexual assault because they present a unique set of issues generally not seen in other inmates.[15] The Bureau of Justice Statistics, part of the U.S. Department of Justice, reported that the rate of sexual assaults from 2011 to 2012 was about ten times higher for transgender

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DISCRIMINATION SURVEY 2 (2011). *See generally* Bill Briggs, *For Transgender Prisoners, Hormones Seen as Matter of Life and Death*, NBC NEWS (Aug. 23, 2013), https://www.nbcnews.com/health/transgender-prisoners-hormones-seen-matter-life-death-6C10981031 ("Self-castration, suicide and waves of desperation are byproducts of the denial of sex hormones to inmates yearning to switch genders.").

10. Brown, *supra* note 6, at 340.

11. Leah Drakeford, *Correctional Policy and Attempted Suicide Among Transgender Individuals*, 24 J. CORR. HEALTH CARE 171, 178 (2018).

12. Briggs, *supra* note 9; *see, e.g.*, Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002) [hereinafter *Kosilek I*] (describing an inmate with gender identity disorder who attempted suicide and castration while incarcerated); De'lonta v. Johnson, 708 F.3d 520, 522 (4th Cir. 2013) (explaining that an inmate with gender identity disorder tried to perform sex reassignment surgery on herself on several occasions), *rev'g* No. 7:11-CV-00257, 2011 WL 5157262, at *1 (W.D. Va. Oct. 28, 2011); Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 WL 2186896, at *1 (D. Idaho 2007) (detailing an inmate with gender identity disorder who made seventy-five requests for medical treatment, attempted suicide, and performed self-castration); Konitzer v. Frank, 711 F. Supp. 2d 874, 884 (E.D. Wis. 2010) (describing an inmate who attempted self-castration six times).

13. George R. Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 INT'L J. TRANSGENDERISM 31, 32 (2010); *see* Brown & McDuffie, *supra* note 7, at 288 (explaining prisoners who engage in this behavior may inadvertently die due to severe blood loss and hemodynamic collapse).

14. *Assault, Retaliation and Abuse: Life as a Transgender Woman in a Men's Prison*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/video/assault-retaliation-and-abuse-life-as-a-transgender-woman-in-a-men-s-prison-79462982002; *Black Trans Inmate Ashley Diamond Alleges New Sexual Assault in GA Prison*, HUFFPOST, https://www.huffpost.com/entry/black-trans-inmate-ashley-diamond-alleges-new-sexual-assault-in-ga-prison_n_5b55ba69e4b004fe162f9ddb (last visited Dec. 22, 2022).

15. *See* Brown & McDuffie, *supra* note 7, at 280 (referring to "safety considerations; predatory behavior by other inmates; rules infractions regarding clothing, hair, and makeup").

inmates as compared to cisgender inmates.[16] The Supreme Court addressed this issue in *Farmer v. Brennan*, but the transgender inmate's claim failed on remand at trial because she could not prove prison officials had put her at risk of sexual assault.[17]

D. *Transgender Inmates' Housing Issues*

To decrease the risk of violence or harassment by other prisoners, some prison officials place transgender inmates in protective custody such as solitary confinement, which does not improve safety.[18] Protective custody restricts a prisoner's mobility and has been found to provoke a sense of unreality and suicidal ideation.[19] According to the Prison Rape Elimination Act National Standards (PREA), an agency should perform a case-by-case evaluation before deciding to assign a transgender inmate to a male or female facility, consider whether an assignment creates management or security problems, and ensure the health and safety of the inmate.[20] However, many states—including Texas—have not complied with the PREA, and the response remains inadequate in several other states.[21] Also, in 2018, the Federal Bureau of Prisons changed its 2017

16. Victoria Harrison, *CEDAW Disapproves: The United States' Treatment of Transgender Women in Prisons*, 13 DEPAUL J. SOC. JUST. 2, 6–7 (2020).

17. *Farmer Loses at Jury Trial*, PRISON LEGAL NEWS (Sep. 15, 1997), https://www.prisonlegalnews.org/news/1997/sep/15/farmer-loses-at-jury-trial/; *see* Farmer v. Brennan, 511 U.S. 825, 830, 848–49 (1994) (finding that the Seventh Circuit should not have granted summary judgment in favor of prison officials where the officials transferred petitioner, a young transgender inmate, to a more violent penitentiary whose prisoners brutally beat and raped petitioner); *see also* Janei Au, *A Remedy for Male-to-Female Transgender Inmates: Applying Disparate Impact to Prison Placement*, 24 J. GENDER, SOC. POL'Y & L. 371, 382 (2016) ("[Petitioner] Farmer's deliberate indifference claim failed because she could not prove that prison officials knew her specific cell mate was a substantial risk to her.").

18. *See* Paul Gendreau et al., *Protective Custody: The Emerging Crisis Within Our Prisons?*, 49 FED. PROB. 55, 60 (1985) (stating that inmates in protective custody reported high levels of fear).

19. Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 GEO. J. GENDER & L. 586, 599 (2014); Harrison, *supra* note 16, at 7.

20. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42 (2015).

21. *See* Derek Gilna, *Five Years After Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/ ("[F]ormer Texas governor . . . Rick Perry declined while in office to either implement PREA or issue an assurance letter . . . Perry's successor as governor, Greg Abbott, filed a letter with the DOJ on May 15, 2015 that confirmed Texas would work to comply with PREA . . . [but determined that] the state would implement PREA's provisions 'wherever feasible' . . . . [G]iven the high number of sexual assaults reported in Texas . . . facilities, as well as a very low substantiation rate for allegations of rape and sexual abuse, critics argued state prison officials should be doing everything possible to reduce incidents of sexual misconduct, not simply what is 'feasible' . . . . [Experts say the] very low rate of substantiated complaints . . .

Transgender Offender Manual by omitting the clause that recommended determining institution assignments based on gender identity and adding instead that biological sex would be the initial determining factor for designation.[22] Fortunately, in 2022, the Transgender Offender Manual was changed to reflect PREA standards and eliminated the use of biological sex as the initial determining factor for institution designation.[23]

E. *Transgender Inmates' Eighth Amendment Causes of Action*

Transgender inmates' medical needs are never isolated from housing, security, and mental health issues.[24] Their access to medical treatment is intertwined with their other basic needs to an extent that implicates constitutional protections. The Eighth Amendment guarantees the right to be free from cruel and unusual punishment,[25] which courts have interpreted to include the right to safe and adequate medical care in correctional settings.[26] Moreover, the National Institute of Corrections has promulgated recommendations which align with this reading of the essential nature of medical treatment in the correctional facility context, suggesting an individualized medical evaluation for determining the necessary care for inmates with GD.[27] Despite that suggestion, it has remained a challenge for transgender inmates to mount successful lawsuits and receive the care they need, especially in the Fifth Circuit.[28] Other circuits have approached such cases with greater understanding in

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reflects an unwillingness to properly follow-up on allegations of rape and sexual abuse."); Rebecca Boone, *Some States Opting Out of Federal Prison Rape Law*, NBCDFW (May 23, 2014), https://www.nbcdfw.com/news/local/some-states-opting-out-of-federal-prison-rape-law/126641/ ("The governors of Idaho, Texas, Indiana, Utah and Arizona have informed U.S. Attorney General Eric Holder that they won't try to meet the standards required under the Prison Rape Elimination Act.").

22. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., TRANSGENDER OFFENDER MANUAL 2 (2018), https://s3.documentcloud.org/documents/4459297/BOP-Change-Order-Transgender-Offender-Manual-5.pdf.

23. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., TRANSGENDER OFFENDER MANUAL 5–6 (2022), https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf.

24. NAT'L INST. OF CORR., U.S. DEP'T OF JUST., POLICY REVIEW AND DEVELOPMENT GUIDE: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PERSONS IN CUSTODIAL SETTINGS 12 (2d ed. 2015), http://info.nicic.gov/sites/info.nicic.gov.lgbti/files/lgbti-policy-review-guide-2.pdf.

25. U.S. CONST. amend. VIII.

26. NAT'L INST. OF CORR., *supra* note 24, at 37; *see, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("The Eighth Amendment . . . imposes duties on . . . [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care.").

27. NAT'L INST. OF CORR., *supra* note 24, at 38.

28. *E.g.*, Gibson v. Collier, 920 F.3d 212, 226–28 (5th Cir. 2019) (holding that the policy of the Texas Department of Criminal Justice to not provide sex reassignment surgeries for prisoners did not violate the Eighth Amendment).

recent years. This point will be elaborated later in the Article.

II. MEDICAL CARE AND DELIBERATE INDIFFERENCE IN PRISONS: TWO SUPREME COURT CASES

A. Estelle v. Gamble

The issue of prisoners' entitlement to adequate medical care based on the Eighth Amendment received the Supreme Court's focus in 1976 in *Estelle v. Gamble*, and the term "deliberate indifference" appeared in this case for the first time.[29] The Court remanded the case without determining whether the prisoner established a valid cause of action.[30] However, the Court did establish the deliberate indifference standard that many courts now apply to inmates' medical issues.[31] According to *Estelle*, in order to establish a proper Eighth Amendment cause of action, a plaintiff must first demonstrate that the plaintiff has a serious medical need, and second, that the prison officials are deliberately indifferent to those needs.[32] The Court held that failure to meet inmates' medical needs is incompatible with "the evolving standards of decency that mark the progress of a maturing society" and is repugnant to the Eighth Amendment.[33] Deliberate indifference to such needs constitutes "unnecessary and wanton infliction of pain."[34] The Court placed greater emphasis on the prison officials' subjective motivations, rather than the standard of care the Constitution requires.[35] Moreover, the Court specified that the "prisoner must allege acts or omissions" that are "sufficiently harmful."[36]

B. Farmer v. Brennan

In 1994, the Supreme Court elaborated on the meaning of deliberate indifference in a lawsuit regarding a sexual assault on a transgender prisoner.[37] The *Farmer* Court held that the subjective recklessness standard, as in criminal law, is how courts should decide whether deliberate indifference existed.[38] To find subjective recklessness, a court must first determine if there was an objective and sufficiently serious risk of harm, and then determine if the defendant was subjectively aware of

29. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
30. *Id.* at 108.
31. *Id.* at 104–05.
32. *Id.* at 106.
33. *Id.* at 102–03 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
34. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
35. Estelle v. Gamble, 429 U.S. 97, 109 (1976) (Stevens, J., dissenting).
36. *Id.* at 106 (majority opinion).
37. Farmer v. Brennan, 511 U.S. 825, 829, 837 (1994).
38. *Id.* at 839–40.

the risk but disregarded it.[39] As in *Estelle*, the Court in *Farmer* highlighted the inquiry into an official's state of mind regarding the harm rather than the mere existence of cruel and unusual conditions.[40] Accordingly, Farmer, a transgender prisoner, had to prove the objective and subjective requirements of the recklessness standard in order for a court to grant injunctive relief under the Eighth Amendment, but Farmer was unable to do so.[41] For transgender inmate litigants, it has remained challenging to establish proof of an official's state of mind.[42]

III. TRANSGENDER INMATES' SERIOUS MEDICAL NEEDS: WPATH STANDARDS AND DSM-5

A. *Recognition of WPATH Standards and DSM-5*

Despite the challenges, transgender inmate plaintiffs have started to gain success in stating plausible Eighth Amendment claims[43] and in receiving hormone therapy,[44] or even SRS,[45] through court orders. This trend has spread as courts give more weight to WPATH Standards, DSM-5 definitions, and GD expert testimonies.[46] The landmark case of *Fields v. Smith*, for instance, created a turning point by offering a lengthy discussion of many expert opinions.[47] In addition, the Department of

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39. *Id.* at 837.

40. *Id.*

41. *Id*. at 846.

42. Laura R. Givens, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER, RACE & JUST. 579, 605–06 (2013); *see* Lizzie Bright, *Now You See Me: Problems and Strategies for Introducing Gender Self-Determination into the Eighth Amendment for Gender Nonconforming Prisoners*, 108 J. CRIM. L. & CRIMINOLOGY 137, 156–59 (2018) (stating that the "higher showing of official state of mind . . . resulted in the denial of care to an incarcerated transwoman").

43. *See, e.g.*, De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013) (finding that the plaintiff demonstrated "an objectively serious medical need for protection against continued self-mutilation" and that the complaint sufficiently alleged the prison officials' deliberate indifference to the plaintiff's serious medical need), *rev'g* No. 7:11-CV-00257, 2011 WL 5157262, at *1 (W.D. Va. Oct. 28, 2011); Rosati v. Igbinoso, 791 F.3d 1037, 1039–40 (9th Cir. 2015) (holding that the allegations in plaintiff's complaint were sufficient to state a claim that prison officials refused to provide SRS, a medically necessary treatment, for plaintiff's GD in violation of the Eighth Amendment).

44. *See, e.g.*, *Kosilek I*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002); Gammett v. Idaho State Bd. of Corr., No. CV05-257-S, 2007 WL 2186896 at *1 (D. Idaho 2007); Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011); Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012).

45. *See* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019); Campbell v. Kallas, No. 16-CV-261-JDP, 2020 WL 7230235 (W.D. Wis. 2020).

46. Bryce T. Daniels, *Eighth Amendment Jurisprudence and Transgender Inmates: The "WPATH" to Evolving Standards of Decency*, 2021 MICH. ST. L. REV. 255, 278–279 (2021).

47. Fields v. Smith, 712 F. Supp. 2d 830, 837–840 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011).

Justice has recognized WPATH Standards in its Policy Review and Development Guide on custodial standards for LGBTQ+ inmates, as well as in its manual of guidelines for housing and security issues related to transgender offenders.[48] The Policy Review and Development Guide asserts that the WPATH Standards are "internationally accepted protocols" and constitute "the proper approach to transgender medical care" according to the National Commission of Correctional Health Care.[49] The Transgender Offender Manual lists the WPATH Standards as an additional resource for clinicians.[50] The Ninth Circuit has also acknowledged that major mental health groups in the United States have recognized WPATH Standards as the appropriate guidance for treatment of gender-dysphoric individuals.[51] However, the Fifth Circuit, as will be discussed in Part IV, has refused to adopt WPATH Standards.[52]

B. *WPATH and DSM-5 Define Gender Dysphoria*

In 2012, WPATH published the seventh version of its Standards of Care since publishing its original 1979 document and provided clinical guidance for GD.[53] Both WPATH Standards and DSM-5 define GD as discomfort or distress because of a discrepancy or incongruence between a person's gender identity and their biological sex.[54] WPATH has stated that transgender individuals are not disordered, that not all gender nonconforming people experience GD, and that treatment for GD should be individualized.[55] In 2013, DSM-5 began using the term "gender dysphoria" instead of "gender identity disorder" (GID) to emphasize the phenomenon of incongruence and to focus more on dysphoria as a clinical problem, not as a disordered identity per se.[56] It also emphasized that, in adults, GD is often accompanied by a desire to be rid of primary or secondary sex characteristics.[57]

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48. NAT'L INST. OF CORR., *supra* note 24, at 10; FED. BUREAU OF PRISONS, *supra* note 23, at 13.

49. NAT'L INST. OF CORR., *supra* note 24, at 10.

50. FED. BUREAU OF PRISONS, *supra* note 23, at 13.

51. Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019).

52. Gibson v. Collier, 920 F.3d 212, 223, 220 (5th Cir. 2019).

53. COLEMAN ET AL., *supra* note 3.

54. *Id.* at 2; DSM-5, *supra* note 1.

55. COLEMAN ET AL., *supra* note 3, at 5–6, 9.

56. *See* DSM-5, *supra* note 1 (defining gender dysphoria as a general descriptive term which refers to "an individual's affective/cognitive discontent with the assigned gender but is more specifically defined when used as a diagnostic category"); *see also* Brown, *supra* note **Error! Bookmark not defined.**, at 334 ("[W]ith the publication of DSM-5 in May 2013, the diagnosis of GID is changed to gender dysphoria (GD) in recognition of the fact that those with this condition do not suffer from a disordered identity but rather from a constellation of symptoms that are both recognizable and treatable.").

57. DSM-5, *supra* note 1, at 452.

C. *Diagnosis, Suggested Treatments, and Treatment of Institutionalized Transgender Persons*

According to DSM-5, the incongruence between experienced gender and somatic sex is a central feature of diagnosis because it creates "clinically significant distress."[58] A GD diagnosis in adults is appropriate when the incongruence stays for at least six months and is manifested by a strong desire for at least two of the following: (1) marked incongruence between an individual's expressed gender and primary and/or secondary sex characteristics, (2) a strong desire to be rid of primary and/or secondary sex characteristics, (3) a strong desire to have the primary and/or secondary characteristic of the other gender, (4) a strong desire to be of the other gender, (4) a strong desire to be treated as the other gender, and (6) a strong conviction that the individual has feelings and reactions typical of the other gender.[59] DSM-5 explains that adults with GD are at increased risk of suicidal ideation, suicide attempts, and suicides before receiving SRS, and many individuals remain distressed if hormone therapy and SRS are not available.[60]

The WPATH Standards suggest psychotherapy, hormone therapy, and SRS as treatments for GD and recommend that mental health professionals who evaluate gender-dysphoric individuals have certain minimal credentials.[61] It also explains the criteria that patients should meet in order to be eligible for the suggested treatments, one of which is twelve months of living in a gender role congruent with the patient's gender identity.[62] Some have argued that this "real-life experience" criterion automatically makes transgender inmates ineligible because they cannot experience it in a prison setting.[63] However, WPATH has clarified that incarcerated transgender persons' health care should mirror

58. *See id.* at 453 (defining "clinically significant distress" as "impairment in social, occupational, or other important areas of functioning").

59. *Id.* at 452.

60. *Id.* at 454.

61. COLEMAN ET AL., *supra* note 3, at 8–9, 13, 15, 22.

62. *Id.* at 60.

63. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 779 (9th Cir. 2019) (explaining a doctor's testimony that it would be difficult for a transgender inmate to "us[e] her time in a men's prison as . . . real-life experience because it doesn't offer her the opportunity to actually experience all those things she is going to go through on the outside"), *aff'g in part, vacating in part sub nom.* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103 (D. Idaho 2018); Campbell v. Kallas, No. 16-CV-261-JDP, 2020 WL 7230235, at *5 (W.D. Wis. Dec. 8, 2020) (citing a Department of Corrections policy that "[d]ue to the limitations inherent in being incarcerated, a real-life experience for the purpose of gender-reassignment therapy is not possible for inmates who reside within a correctional facility"); Soneeya v. Spencer, 851 F. Supp. 2d 228, 235 (D. Mass. 2012) (summarizing the testimony of expert witnesses who "differ[ed] as to the feasibility of a patient undergoing a 'real life experience' as prescribed by the [WPATH] Standards of Care, while incarcerated, and, therefore, whether sex reassignment surgery can ever be medically appropriate for a patient who has not undergone the real life experience as a free person").

that which would be available to them if they were living in a non-institutional setting.[64] More importantly, WPATH cautions that abrupt withdrawal or lack of hormone therapy (as in a "freeze frame" approach) could result in surgical self-treatment by auto-castration, depressed mood, dysphoria, or suicidality.[65]

IV. FROM 2002 TO 2020: TRANSGENDER INMATES' SUCCESS IN ESTABLISHING THEIR CLAIMS

This Article will focus on an eighteen-year period (2002 to 2020) of relevant case law because the question of transgender inmates' medical needs has been an evolving issue; the incorporation of in-depth analyses of WPATH Standards and the consideration of testimony by gender-identity experts in court opinions is a more recent phenomenon. Opinions issued during this eighteen-year period discuss and accept SRS as a method of treatment for GD.[66] The Fifth Circuit, which is a central focus of this Article, issued major holdings regarding medical care for transgender inmates during this period.[67]

A. *2002 to 2011: The Questions of Prison Policy, Political Controversy, Security and Cost*

During the period from 2002 to 2011, federal district and courts of appeals addressed and resolved more basic issues that transgender inmates' medical claims forced. Although the following cases involved medical analyses, their significance lies more in the resolution of obstacles such as prison policies, political controversies, and security and cost issues.

1. *Kosilek I* (District of Massachusetts)

The lack of adequate guidelines for the provision of medical care to transgender inmates is one major issue some courts have addressed, including the court in *Kosilek I*.[68] Michael Maloney was the

64. COLEMAN ET AL., *supra* note 3, at 67.

65. *Id.*

66. *See, e.g.*, *Kosilek I*, 221 F. Supp. 2d 156, 195 (D. Mass. 2002) (noting that SRS might be medically necessary for a transgender inmate "[i]f psychotherapy, hormones, and possibly psychopharmacology are not sufficient to reduce the anguish" caused by the inmate's GD "to the point that there is no longer a substantial risk of serious harm" to the inmate).

67. *See, e.g.*, Praylor v. Tex. Dep't of Crim. Just., 430 F.3d 1208, 1209 (5th Cir. 2005) ("Assuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference.").

68. Brown & McDuffie, *supra* note 7, at 288; *see Kosilek I*, 221 F. Supp. 2d at 193 (noting that, in 2002, whether medical care was necessary for a transgender inmate was a "highly unusual, if not novel, issue" for a Department of Corrections official).

Commissioner of the Massachusetts Department of Corrections (MADOC) during a period of Michelle Kosilek's incarceration.[69] Maloney adopted a blanket policy excluding not only the possibility of SRS but also aiming to "freeze" a transgender prisoner in the condition they were in at the time of incarceration—in other words, not authorizing hormones to prisoners like Kosilek, who had not received prescribed hormone therapy before incarceration.[70] Kosilek, a transgender woman serving a life sentence without the possibility of parole for murder, had attempted suicide twice and attempted to castrate herself once.[71] She was gang raped twice when imprisoned in Chicago.[72] The federal district court held that Kosilek had a serious medical need and that the medical care she had received in prison was inadequate.[73] However, the court held that Maloney had not acted with deliberate indifference because the issue he had faced was novel, and he had adopted the freeze frame policy because of sincere security concerns, public controversy, and political criticism.[74]

Even though Maloney avoided liability, the *Kosilek I* decision was significant for the time because of the court's expectations of how Maloney should act in future.[75] First, the court held that not authorizing hormone therapy because of security reasons is unreasonable.[76] Second, it ruled that denying an inmate adequate medical care because such care would be costly is impermissible.[77] Third, it determined that discharging a constitutional duty based on political or public criticism concerns is illegitimate for Eighth Amendment purposes.[78] Therefore, based on the Harry Benjamin Standards of Care (the former name of the WPATH Standards) and expert opinions, the court ruled that Kosilek should, at a minimum, receive psychotherapy, and if psychotherapy was not helpful, should be evaluated for receiving hormone therapy.[79] In addition, the court noted that if SRS was deemed medically necessary for Kosilek, Maloney could decide whether security concerns justified denial of SRS

69. *Kosilek I*, 221 F. Supp. 2d at 158–159.

70. *Id.* at 159–160.

71. *Id.* at 158, 170.

72. *Id.* at 163.

73. *Id.* at 161. Qualified physicians never even evaluated Kosilek for possible treatment. *Id.*

74. *Id.* at 160, 162, 193.

75. *See Kosilek I*, 221 F. Supp. 2d 156, 193 (D. Mass. 2002) ("The court expects that, educated by the trial record and this decision, Maloney and his colleagues will in the future attempt to discharge properly their constitutional duties to Kosilek.").

76. *Id.* at 162.

77. *See id.* at 161 ("[P]rison officials at times authorize CAT scans, dialysis, and other forms of expensive medical care required to diagnose or treat familiar forms of serious illness.").

78. *See id.* at 162 ("[I]f . . . concerns about cost or controversy [had] prompt[ed] Maloney to deny Kosilek adequate care for his serious medical need, Maloney [would] have violated the Eighth Amendment.").

79. *Id.* at 193–94.

but could risk review by another court for violation of the Eighth Amendment.[80]

2. *Praylor v. Texas Department of Criminal Justice* (Fifth Circuit)

In 2005, not very long after *Kosilek I*, the Fifth Circuit issued its decision in *Praylor v. Texas Department of Criminal Justice*. Prior to *Praylor*, the Fifth Circuit had not addressed the issue of hormone therapy for transgender inmates.[81] The court mentioned other circuits had concluded that declining hormone therapy did not amount to deliberate indifference.[82] It relied on a 1988 Eighth Circuit case, a 1987 Seventh Circuit case, and a 1986 Tenth Circuit case without mentioning the 2002 *Kosilek I* decision.[83] Also, regarding the question whether transsexualism presented a serious medical need, the court assumed that it did without ever considering the Harry Benjamin Standards or DSM-4 (the latest DSM edition at that time).[84] Finally, one of the determining factors for the court was "the disruption to the all-male prison."[85] The Fifth Circuit ignored that *Kosilek I* had already addressed the issue of housing and security of transgender inmates who receive hormone therapy.[86]

3. *Young v. Adams* (Western District of Texas)

Five years after *Praylor*, the Western District of Texas issued a similar decision in response to Brittney Young's lawsuit under 42 U.S.C. § 1983.[87] Relying on *Praylor*, the court in *Young v. Adams* held that hormone therapy was not constitutionally required.[88] Despite Young's action being barred by the statute of limitations, the court explained that

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80. *Id.* at 195.

81. Praylor v. Tex. Dep't of Crim. Just., 430 F.3d 1208, 1209 (5th Cir. 2005).

82. *Id.*

83. *Id.*

84. *Id. But see Kosilek I*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002) (mentioning the Harry Benjamin Standards).

85. *Praylor*, 430 F.3d at 1209.

86. *Id.*; *see Kosilek I*, 221 F. Supp. 2d at 194 ("Prison officials must 'take reasonable measures to guarantee the safety of inmates,' as well as to provide them with adequate medical care. One way to attempt to discharge both of these duties to a transsexual inmate taking hormones is to make reasonable efforts to incarcerate him with a less dangerous population of other prisoners.").

87. Young v. Adams, 693 F. Supp. 2d 635, 636, 641 (W.D. Tex. 2010). *See generally* NAT'L INST. OF CORR., *supra* note 24, at 38 ("Some courts have found that the harmful physiological and psychological effects stemming from the discontinuation of hormone therapy amount to deliberate indifference. Conversely, the U.S. District Court for the Western District of Texas has ruled that an inmate with gender identity disorder (GID) was not entitled to receive hormone therapy, stating that the inmate's 'disagreement with the course of treatment pursued by prison medical staff does not constitute a viable claim for deliberate indifference to serious medical needs under the 8th Amendment.'").

88. *Young*, 693 F. Supp. 2d at 641.

in any event, Young was not entitled to receive hormone therapy.[89] The court never pointed to the *Kosilek I* decision, which indicated that failure to give an individualized assessment may constitute deliberate indifference.[90] The prison officials had denied Young hormone therapy based on the Texas Department of Criminal Justice (TDCJ) policy G-51.11, which TDCJ had formulated in 2006, after *Praylor*.[91] The policy provided for the approval of hormone therapy upon compliance with the following procedures: (1) a confirmed parole or discharge date of 180 days was provided to the approving authority, and (2) letters from the patient's free-world physician and psychiatrist or psychologist stating that the patient was on hormone therapy and intended to have a sex change operation, provided to the approving authority.[92]

The court quoted a 1984 case stating that "imprisonment carrie[s] with it the circumscription or loss of many significant rights."[93] The quoted case, however, involved a Fourth Amendment lawsuit addressing the destruction of a prisoner's property and was unrelated to the medical needs of transgender inmates.[94]

4. *Fields v. Smith* (Eastern District of Wisconsin)

Two months after *Young*, in *Fields v. Smith*, the Eastern District of Wisconsin invalidated a Wisconsin statute because it did not permit the payment of any funds for hormone therapy or SRS.[95] The Wisconsin Department of Corrections (WIDOC) officials had enforced the statute and deprived a group of transgender inmates of the medical care they needed, causing them to experience depression, mood swings, mental and emotional stability, and suicidal ideation among many other symptoms.[96] The court examined the issues of cost, medical needs, and security.[97] The court mentioned the intention of the statute had been to prevent "bizarre taxpayer-funded sex change procedures."[98] WIDOC had been providing

89. *Id.* at 639.

90. *See Kosilek I*, 221 F. Supp. 2d at 186 ("[D]enial of a treatment such as hormone therapy based upon a blanket rule rather than an individualized medical evaluation can constitute deliberate indifference to a serious medical need.").

91. *Young*, 693 F. Supp. 2d at 641–642.

92. *Id.* at 641.

93. *Id.* at 639 (quoting Hudson v. Palmer, 468 U.S. 517, 524 (1984)).

94. *See* Hudson v. Palmer, 468 U.S. 517, 525–26 (1984) ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

95. Fields v. Smith, 712 F. Supp. 2d 830, 866–70 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550, 552 (7th Cir. 2011).

96. *Id.* at 835–836.

97. *Id.* at 835–37, 855–67.

98. *Id.* at 836 (internal quotations omitted).

inmates with other surgeries of equal or greater cost to SRS.[99] Considering medical care, the court heard the testimony of gender-identity expert witnesses who had evaluated the plaintiff-inmates based on WPATH Standards and DSM-5.[100] *Fields* marked the first time a federal court gave significant weight to such testimony, especially to Dr. Brown's, which stated that anti-depressants and psychotherapy are not intended to treat GD.[101] Finally, in response to the defendants' argument that denying hormone therapy and SRS protected inmates from sexual assault, the court noted that inmates can look effeminate without hormone therapy and that there was no evidence in the record "to support a finding that withdrawing hormone therapy from the plaintiffs will decrease the risk that they will become victims of sexual assault."[102] Even the defendants' security expert testified it would be "an incredible stretch" to conclude that banning the use of hormones could prevent sexual assaults.[103]

B. *2012 to 2020: The Question of Transgender Inmates' Serious Medical Needs and Civil Rights Claims*

During the period from 2012 to 2020, federal courts focused more on WPATH Standards, gave more credit to expert opinions, and made it easier for transgender prisoners to establish their claims.[104]

1. *Soneeya v. Spencer* (District of Massachusetts)

In 2012, in *Soneeya v. Spencer*, the U.S. District Court for the District of Massachusetts ordered Commissioner Luis Spencer to make sure Katheena Soneeya, a transgender inmate, received "consistent and timely" treatment for her GD in accordance with WPATH Standards and based on an individualized evaluation.[105] The court also declared the MADOC's GD policy was unconstitutional because it created a "blanket prohibition" on certain treatments like SRS.[106] The *Soneeya* case relied on the 2002 *Kosilek I* decision.[107]

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99. *See id.* at 837 ("While sex reassignment surgery is more expensive than hormone therapy, DOC provides surgeries of equal or greater cost, such as organ transplant and open heart surgical procedures, when medically necessary.").

100. *Id.* at 839–41.

101. *Id.* at 848–50.

102. *Id.* at 867–69.

103. *Id.* at 868 (internal quotations omitted).

104. Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. PUB. HEALTH 31, 34–35 (2014).

105. Soneeya v. Spencer, 851 F. Supp. 2d 228, 252–53 (D. Mass. 2012).

106. *Id.* at 253.

107. *Id.* at 244–45, 249–51.

2. *Kosilek II* (District of Massachusetts and First Circuit)

Commissioner Spencer was the defendant in another 2012 case, with transgender inmate Kosilek again bringing suit; the court referred to this case as *Kosilek II* and to the prior lawsuit as *Kosilek I*.[108] This time, the MADOC doctors found that SRS was the only adequate treatment for Kosilek, and he sought an unprecedented court order when prison officials refused to comply with MADOC doctors' prescribed treatment.[109] In 2006, Kathleen Dennehey, the then-acting Commissioner of MADOC, testified that she denied the request for SRS due to security concerns.[110] The court, however, believed the denial was due to fear of political controversy, criticism, ridicule, and scorn.[111] Dennehey had been under pressure from the Lieutenant Governor and many members of the state legislature.[112] However, as the court held in *Kosilek I*, political controversy is not a legitimate reason to deny SRS.[113] The court also invalidated the testimony of two professionals, Cynthia Osborne and Chester Schmidt, on which the defendants relied.[114] MADOC had fired the doctor who prescribed SRS for Kosilek and hired Osborne, a social worker from Johns Hopkins who worked for a doctor opposing SRS for anyone, especially prisoners.[115] Dr. Schmidt rejected WPATH Standards, which "are followed by prudent professionals."[116] The court also referred to the Seventh Circuit decision in *Fields* to highlight the necessity and adequacy of the care for transgender prisoners.[117] Finding security concerns insincere and pretextual, the court ordered that Kosilek receive SRS as promptly as possible.[118]

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108. Kosilek v. Spencer, 889 F. Supp. 2d 190, 196–200 (D. Mass. 2012) [hereinafter *Kosilek II*], *rev'd*, 774 F.3d 63, 68 (1st Cir. 2014).

109. *Id.* at 196–98.

110. *Id.* at 197–98.

111. *Id.* at 203.

112. *See id.* ("The Lieutenant Governor in whose administration Dennehy served publicly opposed using tax revenues to provide Kosilek sex reassignment surgery. Many members of the state legislature, including one who was close to Dennehy, did the same.").

113. *See id.* ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

114. *See Kosilek II*, 889 F. Supp. 2d 190, 232 n.14, 236 (D. Mass. 2012), *rev'd*, 774 F.3d 63, 68 (1st Cir. 2014) (stating that Dr. Schmidt, a medical doctor, was "not a prudent professional" and that "the court's assessment and analysis of Dr. Schmidt's testimony is equally applicable to Osborne," a social worker).

115. *Id.* at 201–03.

116. *Id.* at 202.

117. *Id.* at 197, 199, 208.

118. *Id.* at 203–05. *See generally* Michael Levenson, *Elizabeth Warren Disagrees with Judge's Sex Change Ruling*, BOS. GLOBE (Sept. 7, 2012, 10:41 AM), https://www.bostonglobe.com/metro/2012/09/07/elizabeth-warren-radio-interview-disagrees-

The First Circuit reversed *Kosilek II* in 2014 and did not authorize SRS after Kosilek's twenty-two-year lawsuit by invalidating the testimony of experts hired by MADOC (University of Massachusetts and Fenway Clinic doctors), giving deference to the expert opinions that the district court had found invalid, and highlighting the security concerns that the district court had found unsubstantiated.[119] The First Circuit also ruled the prison administrators, not the court, must determine what security concerns may arise if an incarcerated transgender woman is transferred to a female prison after surgery.[120] This issue, however, was resolved differently in *Fields*, which held that the Wisconsin statute did not provide any security benefits and that deferring to prison administration in implementing the ban on hormone therapy was not warranted.[121]

3. *De'lonta v. Johnson* (Fourth Circuit)

In 2013, the Fourth Circuit reversed a district court's dismissal of a transgender inmate's lawsuit for denial of SRS.[122] Reasoning by way of analogy, the court explained that prison officials would not be immunized from constitutional suit if they provided painkillers for an injury that should have received an evaluation for surgery.[123] Therefore, the court

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with-sex-change-ruling-addresses-native-american-issue/2kiz8FGO5T9cFZxhxOm3KJ/story.html (quoting Elizabeth Warren as stating that providing SRS for Kosilek was not a good use of taxpayer funds); Denise Lavoie, *Sen. Scott Brown Calls Inmate Sex-Change 'an Outrageous Abuse of Taxpayer Dollars;' Advocates Praising Ruling*, MASSLIVE (Sept. 5, 2012, 12:05 PM), https://www.masslive.com/news/2012/09/sen_scott_brown_calls_inmate_s.html ("Kosilek's lawsuit has become fodder for radio talk shows and Massachusetts lawmakers who say the state should not be forced to pay for a convicted murderer's sex-change operation—which can cost up to $20,000—especially since many insurance companies reject the surgery as elective."); Justin Snow, *Barney Frank Backing Appeal of Ruling Requiring Sex-Reassignment Surgery for Transgender Inmate*, METRO WEEKLY (Oct. 1, 2012), https://www.metroweekly.com/2012/10/barney-frank-backing-appeal-of/ (discussing some of the political reactions to the *Kosilek II* decision).

119. Kosilek v. Spencer, 774 F.3d 63, 71–73, 85–89, 92–96 (1st Cir. 2014), *rev'g Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012). The First Circuit found that "[t]he district court . . . erred by substituting its own beliefs for those of multiple medical experts." *Id.* at 88–89. The First Circuit also held that the district court acted in error because, "rather than deferring to the expertise of prison administrators, the district court ignored the DOC's stated security concerns, reasoning both that Kosilek could be housed safely and that the DOC had not acted out of a legitimate concern for Kosilek's safety and the security of the DOC's facilities." *Id.* at 92–93.

120. *Id.* at 93–95.

121. *See* Fields v. Smith, 712 F. Supp. 2d 830, 868–70 (E.D. Wis. 2010) (invalidating the Wisconsin statute because it was not rationally related to prison security, despite arguments by prison officials that the statute reduced the risk of sexual assaults), *aff'd*, 653 F.3d 550, 552 (7th Cir. 2011).

122. De'lonta v. Johnson, 708 F.3d 520, 524, 526–27 (4th Cir. 2013), *rev'g* No. 7:11-CV-00257, 2011 WL 5157262, at *1 (W.D. Va. Oct. 28, 2011).

123. *Id.* at 526.

held that Ophelia De'lonta, a pre-operative transgender inmate suffering from mental anguish and imminent urges to castrate herself, had stated a plausible Eighth Amendment claim because she had never been evaluated for SRS.[124]

4. *Rosati v. Igbinoso* (Ninth Circuit)

In 2015, the Ninth Circuit rendered a decision in a case challenging the denial of SRS to Mia Rosati, a California inmate.[125] Rosati, based on WPATH Standards, alleged that her symptoms (including repeated self-castration attempts) were severe and that "prison officials recklessly disregarded an excessive risk to her health by denying SRS solely on the recommendation of a physician's assistant with no experience in transgender medicine."[126] The court held, without determining whether SRS was medically necessary, that Rosati's gender dysphoria was severe and that she had alleged a plausible Eighth Amendment claim.[127]

5. *Gibson v. Collier* (Fifth Circuit)

The Fifth Circuit made its most significant holding in 2019 in *Gibson v. Collier*. Here, transgender Texas inmate Gibson asked for an evaluation for SRS, an option TDCJ had never included in its policy manual, G-51.11.[128] The court reasoned that Gibson's disagreement with the diagnostic decisions of medical professionals did not provide a basis for a civil rights lawsuit.[129] Furthermore, the court relied mostly on the First Circuit's 2014 decision in *Kosilek v. Spencer* that reversed *Kosilek II*, especially to highlight the lack of consensus in the medical community about the necessity and efficacy of SRS as a treatment for gender dysphoria and to emphasize that "WPATH Standards of Care reflect not consensus, but merely one side in a *sharply contested* medical debate over sex reassignment surgery."[130]

The "sharp contest" the Fifth Circuit believed existed in the First Circuit's analysis, however, started when MADOC decided to provide treatment for Kosilek and adopted a new plan upon the court's order in *Kosilek I*.[131] Under this plan, MADOC contracted with the University of Massachusetts Correctional Health Program ("UMass").[132] In 2003, after

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124. *Id.* at 521–23, 526–27.

125. Rosati v. Igbinoso, 791 F.3d 1037, 1039–40 (9th Cir. 2015).

126. *Id.* at 1040.

127. *Id.*

128. Gibson v. Collier, 920 F.3d 212, 216–18 (5th Cir. 2019).

129. *Id.* at 220.

130. *Id.* at 221 (emphasis added).

131. Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014), *rev'g Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012).

132. *Id.*

consulting with MADOC staff, UMass engaged Dr. David Seil to evaluate Kosilek.[133] Dr. Seil found that Kosilek could require SRS after a year of "real life experience" on hormones.[134] MADOC then fired Dr. Seil.[135] Surprisingly, this was not the first time MADOC terminated an expert because of Kosilek's evaluation.[136] Dr. Marshall Forstein had recommended that MADOC provide SRS consultation for Kosilek, but MADOC terminated him as well in 2000.[137] Things did not end there. In 2004, Dr. Kenneth Appelbaum, the Mental Health Program Director at UMass, suggested Fenway Clinic experts evaluate Kosilek, and Dr. Randi Kaufman and Dr. Kevin Kapila from the Fenway Clinic both recommended that Kosilek receive SRS.[138] Dr. Appelbaum and Dr. Arthur Brewer confirmed the Fenway Clinic's report.[139] In addition to all of the aforementioned doctors' recommendations, Dr. Mark Burrows, Kosilek's psychiatrist of five years, "stated that denying surgery would likely have a negative impact on Kosilek's mental health," and Dr. George Brown, Kosilek's expert witness, testified in 2006 that as a result of his 2001 evaluations, Kosilek required SRS.[140] Finally, MADOC employed Osborne, a social worker, who "had advised several states that sex reassignment surgery was not appropriate for each of the prisoners she had evaluated," and Dr. Chester Schmidt, whose recent work had focused "primarily on medical billing procedures rather than treatment of gender identity disorders."[141] Therefore, if there was a "sharp contest" at all, as the Fifth Circuit put it, there were more doctors suggesting SRS than those who opposed it.

The Fifth Circuit relied on *Spencer* without comparing the facts of that case to Gibson's situation and without ever providing Gibson with individualized evaluations by gender identity experts.[142] The *Gibson* opinion is lengthy, with more extensive analysis than *Praylor* and *Young*. However, it suffers from the same lack of case-by-case consideration. The court did not even analyze the main issue of why the TDCJ did not consider individualized assessment of transgender prisoners for SRS in

133. *Kosilek II*, 889 F. Supp. 2d 190, 218 (D. Mass. 2012), *rev'd*, 774 F.3d 63, 68 (1st Cir. 2014).

134. *Id.*

135. *Id.* at 219.

136. *Id.* at 218–19.

137. *Id.* at 216, 219.

138. Kosilek v. Spencer, 774 F.3d 63, 70–71 (1st Cir. 2014), *rev'g Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012).

139. *Id.* at 71.

140. *Id.* at 74–75.

141. *Kosilek II*, 889 F. Supp. 2d at 202.

142. *See* Gibson v. Collier, 920 F.3d 212, 224–25 (5th Cir. 2019) (rejecting the argument that the Eighth Amendment requires individualized assessments of an inmate's specific medical needs).

its manual.

Moreover, Kosilek had different allegations than those of Gibson.[143] Though the issues were similar, the facts were not exactly the same. Even if the facts had been completely alike, *Spencer* was not the ideal case to rely upon due to the ongoing political controversy before the First Circuit reversed *Kosilek II*.[144] In *Gibson*, the majority never mentioned other major circuit decisions—such as *Fields*, *De'lonta*, or *Rosati*, all of which recognized WPATH Standards as the medical basis of their analyses[145] —except in a brief footnote.[146] The only similar case *Gibson* mentioned was *Edmo v. Idaho Department of Corrections*, opining that "just as the district court in *Kosilek* was subsequently reversed by the First Circuit *en banc*, so too the judgment of the district court in *Edmo* should not survive appeal."[147] However, in 2019, *Edmo* did survive appeal in *Edmo v. Corizon*.[148] Although the Fourth, Seventh, and Ninth Circuits were moving a step forward in considering transgender prisoners' medical needs around the same time that *Gibson* was decided,[149] the Fifth Circuit in *Gibson* did not demonstrate any change of attitude toward transgender inmates' rights.

6. *Edmo v. Corizon* (Ninth Circuit)

The last three recent cases happened in August 2019, July 2020, and December 2020 in the Ninth, Fifth, and Seventh Circuits, respectively.

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143. *Compare Spencer*, 774 F.3d 63, 86 (summarizing the issue as "whether SRS is a medically necessary component of Kosilek's care, such that any course of treatment not including surgery is constitutionally inadequate"), *with Gibson*, 920 F. 3d at 218 (explaining that Gibson sought to challenge G-51.11 as unconstitutional and demanded an injunction requiring evaluation for SRS).

144. *See Kosilek II*, 889 F. Supp. 2d at 203 (noting there were "ample reasons to expect" that providing SRS to Kosilek would spark political controversy based on commentary by politicians and the media, the latter of which "regularly ridiculed the idea that a murderer could ever be entitled to such 'bizarre' treatment").

145. *See supra* Part IV, Section A, Subsection 4; *supra* Part IV, Section B, Subsections 3–4.

146. *See Gibson*, 920 F. 3d at 223 n.8 (explaining that the Fourth and Ninth Circuit decisions in *De'lonta* and *Rosati*, respectively, only allowed Eighth Amendment claims for SRS to survive dismissal without evaluating the merits of the claims and thus did not expressly reject *Spencer*).

147. *Gibson*, 920 F.3d at 225.

148. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019) ("We hold that where, as here, the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eighth Amendment's prohibition on cruel and unusual punishment."), *aff'g in part, vacating in part sub nom.* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103 (D. Idaho 2018).

149. *See infra* Part IV, Section B, Subsections 6, 8; *see also* De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) (holding that an Eighth Amendment claim for failure to evaluate a transgender inmate for SRS was sufficiently plausible to survive dismissal), *rev'g* No. 7:11-CV-00257, 2011 WL 5157262, at *1 (W.D. Va. Oct. 28, 2011).

Again, the Fifth Circuit decision differed from the decisions of the Seventh and Ninth Circuits. In *Corizon*, the Ninth Circuit directly ordered the defendants to provide SRS and held that prison authorities acted with deliberate indifference to Adree Edmo's serious medical needs.[150] Corizon psychiatrist Dr. Scott Eliason asserted SRS was inappropriate for Edmo because she had not lived in her identified gender role outside of prison for twelve months.[151] Instead of relying on Dr. Eliason's recommendations, the court focused on Dr. Randi Ettner's concern about Edmo's castration attempts and cutting behaviors.[152] Both sides agreed that the WPATH Standards are the "appropriate benchmark" regarding treatment for gender dysphoria.[153] The Ninth Circuit highlighted the district court's conclusion that the defendants' "experts appear[ed] to misrepresent the WPATH Standards of Care."[154] The *Corizon* court found that the "weight of opinion in the medical and mental health communities" had determined SRS was safe, effective, and medically necessary in specific cases, and that only *Spencer* and *Gibson* had questioned WPATH Standards, calling the Fifth Circuit "the outlier."[155] This case also emphasized, more than any other case, that the WPATH Standards apply equally to all individuals "irrespective of their housing situation."[156] The court also relied on the analogy the Fourth Circuit made in *De'lonta*.[157] Edmo became the first transgender inmate to receive SRS as the result of an Eighth Amendment lawsuit.[158]

7. *Williams v. Kelly* (Fifth Circuit)

In 2020, the Fifth Circuit applied the reasoning in *Gibson* to another lawsuit brought by a transgender prisoner and affirmed the district court's denial of the plaintiff's motion for a preliminary injunction.[159] Plaintiff-inmate Williams requested provision of SRS and transfer to an all-female prison.[160] As in *Gibson*, there were no individualized evaluation reports of Williams' medical needs by experts, and the district court analyzed

150. *Corizon, Inc.*, 935 F.3d at 767.
151. *Id.* at 774.
152. *Id.* at 776.
153. *Id.* at 767.
154. *Id.* at 780 (internal quotations omitted).
155. *Id.* at 770, 795–96.
156. Edmo v. Corizon, Inc., 935 F.3d 757, 771 (9th Cir. 2019) (internal quotations omitted).
157. *Id.* at 793–94.
158. *Inmate Who Sued for Gender Surgery Seeks $2.8M in Legal Fees*, KTVB (Nov. 10, 2021, 2:23 PM), https://www.ktvb.com/article/news/local/adree-edmo-sues-for-legal-fees-gender-surgery-idaho-prison/277-b2b500cf-6564-4eaf-a27c-0758dabc3915.
159. Williams v. Kelly, 818 F. App'x 353, 354 (5th Cir. 2020), *aff'g* No. 17-12993, 2018 WL 4403381 at *1 (E.D. La. Aug. 27, 2018), *cert. denied*, 141 S. Ct. 678 (2020).
160. Williams v. Kelly, No. 17-12993, 2018 WL 4403381 at *2 (E.D. La. Aug. 27, 2018), *aff'd*, 818 F. App'x 353 (5th Cir. 2020).

Estelle, *Kosilek I*, and *Spencer* without mentioning *Rosati* or *De'lonta*.[161] Furthermore, one of the court's arguments was that transgender prisoners have had little success with such claims against prison officials.[162] Here, the court quoted an article, not a case, without providing much context.[163] The fact that prisoners have had little success in proving their rights is not a good foundation for a court's reasoning.

8. *Campbell v. Kallas* (Western District of Wisconsin)

Finally, in the most recent case at the time of this writing, the prison officials contended that the WPATH Standards did not reflect a consensus but rather only one side of the medical debate over SRS.[164] The court pointed to a controversy highlighted in the opinion of Osborne, an expert for WIDOC.[165] Osborne testified that "the WPATH organization had moved from its original purpose of evaluating evidence about effective treatment for gender identity issues toward excessively zealous advocacy."[166] Osborne herself, however, endorsed and used the WPATH Standards in her professional work.[167] WIDOC also followed the criteria in the WPATH Standards in deciding treatments for transgender inmates.[168] In response to Campbell's 2013 request for SRS, WIDOC declined the request.[169] This decision, the district court held, was based on WIDOC's policy that "a real-life experience for the purpose of gender-reassignment therapy is not possible for inmates" and lacked scientific basis.[170] The court also found that ameliorating treatment was insufficient to alleviate Campbell's GD.[171] The court reasoned that WIDOC's policy "flatly" prohibited SRS for inmates because of their inability to achieve a real-life experience in prison and that the policy was not based on individualized assessments.[172] Moreover, the court granted Campbell's motion to exclude Dr. Schmidt's opinion as unreliable.[173] Finally, the court highlighted that Campbell's suffering would continue

161. *Id.* at *9–11. The district court in *Williams* did mention *Fields* to support the proposition that the use of hormone therapy is often sufficient to control GD. *Id.* at *9.

162. *See id.* (explaining that plaintiffs bringing Eighth Amendment claims most often fail on proving deliberate indifference).

163. *Id.*

164. Campbell v. Kallas, No. 16-CV-261-JDP, 2020 WL 7230235, at *4 (W.D. Wis. Dec. 8, 2020).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *5.

170. Campbell v. Kallas, No. 16-CV-261-JDP, 2020 WL 7230235, at *5–6 (W.D. Wis. Dec. 8, 2020).

171. *Id.* at *7.

172. *Id.*

173. *Id.* at *2.

without SRS, dysphoria would cause her anguish and create risk of self-harm or suicide, and SRS would not be more expensive than the other treatment WIDOC had provided.[174] The court held that the act of alleviating the needless suffering of those who are dependent on the government for their care is outweighed by the beliefs of some members of the public who are outraged at efforts to improve inmates' health.[175]

CONCLUSION

Between 2002 and 2011, federal courts addressed and attempted to resolve questions of security, housing, cost, and political controversy regarding the treatment of inmates with GD. Between 2012 and 2020, courts placed greater focus on WPATH Standards and transgender inmates' medical needs, even ordering SRS in two cases.[176] Over time, it has become easier for transgender inmates to establish constitutional claims for medical treatment. Even the Fifth Circuit, which at first did not consider hormone therapy necessary,[177] now seems to recognize the necessity of such treatment even if it does not value SRS.[178] However, what creates controversy is the Fifth Circuit's belief that there is no consensus regarding the authority of the WPATH Standards. The Fifth Circuit is applying its reasoning in isolation, ignoring both WPATH and other courts' opinions. Even the *Kosilek I* court did not remove the option of SRS, but the *Williams* court did in 2020.[179] In light of *Edmo* and *Campbell*, it is now time for the Fifth Circuit to consider a more comprehensive evaluation plan for transgender prison inmates. The Fifth Circuit should rely on the WPATH Standards in framing a new approach. For example, the Fifth Circuit should require applicable state departments to have individualized evaluations for SRS by experts. This requirement would protect transgender inmates from assaults, suicide, and self-castration attempts and make existing policies more in line with the "evolving standards of decency that mark the progress of a maturing

174. *Id.* at *8.

175. *Id.*

176. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (ordering that the defendants provide SRS to Edmo), *aff'g in part, vacating in part sub nom.* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103 (D. Idaho 2018); Campbell v. Kallas, No. 16-CV-261-JDP, 2020 WL 7230235, at *8–9 (W.D. Wis. Dec. 8, 2020) (determining that an injunction should be issued to require the provision of SRS to Campbell).

177. Young v. Adams, 693 F. Supp. 2d 635, 639 (W.D. Tex. 2010).

178. *See* Williams v. Kelly, 818 F. App'x 353, 354 (5th Cir. 2020) (noting that the defendants had offered hormone therapy to a transgender inmate so they had not acted with deliberate indifference to the inmate's medical needs), *aff'g* No. 17-12993, 2018 WL 4403381 at *1 (E.D. La. Aug. 27, 2018), *cert. denied*, 141 S. Ct. 678 (2020).

179. *Id.*

society."[180]

180. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).